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U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

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BSG:AML

DJ No. 90-11-3-1620/2

DRAFT

VIA EMAIL AND REGULAR MAIL

Michael J. O'Callaghan
Shumaker, Loop & Kendrick
41 S. High Street, Suite 2210
Columbus, OH 43215
FAX: 614 463-1108

Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Split between the United States and the Private Contribution Plaintiffs

Dear Mike:

Over the course of numerous months, you, Craig, Karl (when he was still involved in this case), and I have discussed the issue of how to split, as between the United States in its cost recovery action and the plaintiffs in the private contribution action (the "Work Group"), the proceeds of any settlement or judgment that may eventually be reached with the four defendants we both are pursuing: Aeronca, Whitton, the Dick Clarke entities, and the Marty Clarke entities. As you know, up to this point, the proceeds from the significant settlements that have taken place in the Skinner matter have been split 80% to the Work Group and 20% to the United States. Because the United States, however, now must actively litigate this action, and because the Work Group is aware that the 80/20 split was for past purposes only, it is necessary to advise the Work Group that Craig and I have significantly different expectations with respect to any future settlements. And indeed, in a telephone conversation with you on December 19, 2001, you recognized that reality, and made a proposal that was very much in the ballpark of what Craig and I could agree to.

Before setting forth the proposal of Craig and me, however, I must remind you that the proposal is not binding upon the United States. Neither Craig nor I have any authority to make such a binding agreement. The only time that the United States would make a binding agreement regarding the amount of any settlement proceeds that the Work Group would share in would be when the settlement itself was up for consideration. Manifestly, we have no settlements with respect to our four defendants. Future activities, changes, or new circumstances may significantly alter what the United States ultimately may agree to with respect to splitting the proceeds of any settlement in this action, and nothing in this letter should be construed otherwise.

Nevertheless, Craig and I believe that the participation of the Work Group will add value to the litigation process, and we appreciate the work that the Group has done in the past on the Skinner Site. Therefore, subject to the conditions set forth below, at this point in time, Craig and I would be prepared to recommend to the appropriate authorities in the Department of Justice and EPA that the proceeds from future settlements be split as follows:

First \$100,000	100% United States
\$100 K to \$1.5 million	50% United States/50% Work Group
1.5 million to 3.0 million	70% United States/30% Work Group
Over \$3.0 million	80% United States/20% Work Group

The “tiers” include all settlements combined. For example, if the first settlement were for \$200,000, the United States would receive \$150,000, and the Work Group would receive \$50,000. If the next settlement were for \$300,000, the United States would receive \$150,000, and the Work Group would receive \$150,000, and the like.

The above-referenced proposal is contingent upon the following conditions:

- (1) The Work Group would have to pay 50% of the costs of a construction debris expert and a financial expert (for the Dick and Marty Clarke entities), to the extent such experts are necessary (and it seems to me that a construction debris expert clearly would be necessary);
- (2) The lawyers representing the Work Group – and you in particular (given your very substantial knowledge of this action) – would have to continue to maintain an active role in the litigation in a proportion of about 50%;
- (3) The proposal is valid only for settlements, not trial;
- (4) The proposal is valid only for Phase I of the litigation; because Phase II involves EPA’s costs, Craig and I would expect that the relative work that the United States would undertake would be significantly greater;
- (5) The proposal must be reevaluated by Craig and me every six months.

Craig and I have found common agreement with you in the past, Mike, and we would hope to continue to approach the “split” issue with fairness in the future if new circumstances may warrant a reevaluation.

If you have any questions, please do not hesitate to call me.


Sincerely,

Annette M. Lang
Trial Attorney

cc: Craig Melodia (via email)

DOUGLAS BALLOTTI

01/03/02 02:29 PM


To: Craig Melodia/R5/USEPA/US@EPA
cc:
Subject: Re: Cost Sharing Agreement at Skinner Landfill 

I think the amount outlined in the letter is fine.

Craig Melodia

Craig Melodia

01/03/02 01:39 PM

To: DOUGLAS BALLOTTI/R5/USEPA/US@EPA
cc:
Subject: Re: Cost Sharing Agreement at Skinner Landfill 

Doug,


Thanks for the message. I just want to clarify: do you agree with the split outlined in the letter or do you want a greater share of the proceeds? The problem with seeking a greater split than the one in the letter is that we have to give the plaintiffs an incentive to participate in the litigation. I will talk to DOJ about seeking a greater split if you feel that is appropriate, however.

Thanks,

Craig
DOUGLAS BALLOTTI

DOUGLAS BALLOTTI

01/03/02 01:22 PM

To: Craig Melodia/R5/USEPA/US@EPA
cc: Deborah Garber/R5/USEPA/US@EPA, Eric
Cohen/R5/USEPA/US@EPA, Scott Hansen/R5/USEPA/US@EPA
Subject: Re: Cost Sharing Agreement at Skinner Landfill 

Craig,

The tiered approach as outlined for splitting proceeds with plaintiff PRPs seems reasonable. Given the substantial amount of work needed to litigate this case, a split that is more favorable to EPA is appropriate.

Thanks. Doug

Craig Melodia

Craig Melodia

01/02/02 11:05 AM

To: DOUGLAS BALLOTTI/R5/USEPA/US@EPA, Scott
Hansen/R5/USEPA/US@EPA
cc: Eric Cohen/R5/USEPA/US@EPA, Deborah
Garber/R5/USEPA/US@EPA
Subject: Cost Sharing Agreement at Skinner Landfill

Doug, Scott:

I wanted to apprise you of a development in the ongoing cost recovery litigation related to the Skinner Landfill, and to seek approval for a cost sharing agreement as outlined in the draft letter. As you may recall, the U.S. has entered into 3 consent decrees at the Skinner Site: the RA decree, the MSW decree, and most recently we lodged a cost recovery decree with the court resolving claims against 3 PRPs at the Site (Acme Wrecking, David Hirshberg Co., and Sealy). In August DOJ filed a complaint against the remaining nonsettling PRPs (Aeronca, Dick Clarke entities, Marty Clarke entities, John J. Whitton Trucking Co.).

A group of PRPs that are implementing the RA at the site have also filed a contribution claim against the same defendants and the two actions have been joined. The private plaintiffs have been cooperative and have information that will prove helpful to our liability case. We intend to prosecute the case jointly, although we expect the government to take the lead on depositions and if necessary at trial. The plaintiffs have made a proposal on how to split any settlement proceeds, and DOJ drafted a counterproposal (see attached draft letter). The U.S. has more than 4 million in costs at the site, and we don't expect to recover more than \$1.5 million from the remaining defendants. Splitting whatever money we get, therefore, will reduce our recovery. We are willing to some split, however, because of the information and expertise the plaintiffs can provide during litigation and because they are implementing the remedy and have a legitimate contribution claim against the defendants. The split in the RA decree was 80/20 in favor of the Skinner Work Group. This split will obviously be adjusted now to reflect the government's outstanding costs, statutory advantage in cost recovery, and increased effort during cost recovery.

The DOJ attorney would like to get the attached letter out soon, and I wanted to check to see whether the split is acceptable in principle to the SF Division and whether a letter outlining our agreement in principle is sufficient to memorialize our understanding. As the letter makes clear, this is not binding EPA to a specific split and we reserve the right to revisit the issue after we know the relative time and expense the government and the private plaintiffs have spent during settlement/litigation. This is really just an offer that we hope will result in an agreement in principle that ultimately will be incorporated into a consent decree. I did, however, want to give you an early opportunity to review our position. Please let me know if you have any questions or objections to the proposed letter.

Thanks,

Craig



workgroup-ltr2.WPL

Eric Cohen

01/03/02 10:11 AM

To: Craig Melodia/R5/USEPA/US@EPA

cc:

Subject: Re: Cost Sharing Agreement at Skinner Landfill 

looks fair to me craig
Craig Melodia

Craig Melodia

01/02/02 11:05 AM

To: DOUGLAS BALLOTTI/R5/USEPA/US@EPA, Scott
Hansen/R5/USEPA/US@EPA

cc: Eric Cohen/R5/USEPA/US@EPA, Deborah
Garber/R5/USEPA/US@EPA

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Thanks,

Craig